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No. 723

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

DAVID DAVIES, INC.

Petitioner,

vs.

MAYNARD E. SENSENBRENNER, ETC., ET AL.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Cases Cited

Arkansas Building Assn. v. Madden, 175 U. S., 269 14
Brunner v. Rhodes, 95 Ohio Appeals, 259 6
Carpenter v. Shaw, 280 U. S., 363 ..... 12, 14
Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U. S., 278 13
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Ward v. Love County, 253 U. S., 17 ..... 9, 11, 14

Text Cited

12 Am. Jur., Section 575 14

Statute Cited

Revised Code of Ohio—
Section 3707.28 4

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above-entitled case on December 17, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 168 O. S. 356 and is set forth in Appendix I herein.

The opinion of the Court of Appeals of Franklin County, Ohio is unreported and is set forth in Appendix II herein.

The opinion of the Court of Common Pleas of Franklin County, Ohio is reported in 79 Ohio Law Abstract 33 and is set forth in Appendix III herein.

JURISDICTION

The judgment of the Supreme Court of Ohio was rendered on December 17, 1958 and was journalized upon the same date.

The jurisdiction of this court is invoked under 28 U. S. C. Section 1257 (3).

QUESTIONS PRESENTED

1. Did the dismissal of petitioner's appeal in this action by the Supreme Court of Ohio, resulting in the denial of the right of petitioner to recover monies paid involuntarily under an illegal and void regulation of the Board of Health of the City of Columbus, Ohio Health District, constitute a violation by said court of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

2. Did the illegal assessments of meat inspection fees by the Board of Health of the Columbus, Ohio Health District against petitioner and the involuntary payment thereof by petitioner constitute the taking of petitioner's property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and was petitioner accordingly entitled to the return thereof from the City of Columbus, O.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States is the constitutional provision involved herein. It may be found in U. S. Code, 1952 Ed., Titles 1-14, Page XLV, and reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Material Facts.

The petitioner, David Davies, Inc., is an Ohio corporation which, during the period involved in this action and for many years prior thereto, was and had been engaged in the business of slaughtering and processing meat and meat products at its packing plant in the city of Columbus, Ohio and in the sale of said meat and meat products within the state of Ohio.

For at least 25 years prior to March 1947, the Board of Health of the Columbus, Ohio City Health District (hereinafter designated as the "Board of Health") had provided meat inspection services at petitioner's plant free of any charge therefor.

On March 31, 1947, the Board of Health passed Regulation 70-2 (Exhibit A, agreed statement of fact) requiring the payment of a fee for the meat inspection services rendered by it to the slaughterers and processers of meat in Columbus, Ohio. Section 6 of the regulation provided that a monthly statement of fees due would be rendered to each meat slaughterer using this service, that a payment of fees assessed for each month must be made by the 15th day of the following month, and that if the fees were not paid, inspection services would be withdrawn until payment was made.

85% of the meat sold by petitioner was sold in Columbus, Ohio and other Ohio communities which required that the meat so sold must be inspected by a recognized Board of Health or the U. S. Department of Agriculture. Petitioner, therefore, had to have acceptable meat inspection in order to remain in business. The only agencies which actually performed meat inspection services in Columbus and Franklin County, Ohio during the period here in question were the Columbus Board of Health and the Department of Agriculture of the United States. Petitioner did not sell its meat in interstate commerce and therefore could not obtain the inspection services of the Department of Agriculture of the United States. Accordingly, the only inspection service available to the petitioner during the period in question was that furnished by the Board of Health. It accordingly was forced to retain that inspection in order to continue to operate.

The Board of Health provided meat inspection at David Davies, Inc., during the period from March 31, 1947 through November 1, 1953, and, in accordance with Regulation 70-2, assessed a fee for that inspection each month. In accordance with directions from the Board of Health, David Davies, Inc., each month executed and sent to the Columbus City Treasurer a check in the amount of the fee assessed. The total amount thus paid to the Columbus City Treasurer during the period involved was $145,785.95.

In explanation of the payment of the fees to the City of Columbus rather than to the Board of Health which had assessed them, it should be pointed out that the Board of Health had no fiscal administration of its own, but its expenses were normally paid by the City of Columbus pursuant to the provisions of Ohio Revised Code Section 3707.28:

> *R. C. 3707.28.* "When expenses are incurred by a board of health under sections 3707.01 to 3707.53, in-

clusive, of the Revised Code, upon application and certificate from such board, the legislative authority of the municipal corporation shall pass the necessary appropriation ordinances to pay such expenses. The legislative authority may levy and set apart the necessary sum to pay such expenses and to carry such sections into effect."

With its first inspection fee payment and with each payment thereafter during the period in question, petitioner transmitted a letter protesting the payment of the fee. (Exhibit J, agreed statement of fact). This letter stated in brief that the Board of Health had no authority to assess any meat inspection fee; that under the regulations unless the fee were paid the inspection services would be withdrawn; that regulations of the Columbus Board of Health and of other cities in which petitioner sold its meat prohibited the sale of meat which had not been inspected, and that consequently a withdrawal of meat inspection would result in a complete cessation of petitioner's business, with consequent great and irrevocable damage; that for these reasons the fee was being paid under protest.

Immediately after the passage of Regulation 70-2, the council of the City of Columbus passed Ordinance No. 204-47 (Exhibit E, agreed statement of fact) establishing a fund into which all meat inspection charges which were paid into the city treasury were to be credited. Furthermore, said City Council, in Ordinance No. 286-47, made an appropriation of that money into the meat inspection fund for the use of that fund.

In 1948, by Ordinance No. 2-48 (Exhibit G, agreed statement of fact) the Columbus City Council passed an ordinance providing that henceforth all meat inspection fees paid into the city treasury were to be credited to the general fund of the City of Columbus, and that funds for-

the Meat Inspection Division of the Board of Health should then be appropriated in the annual appropriation ordinance therefrom. This ordinance remained in full force and effect and operation during the remainder of the period here in question and accordingly all meat inspection fees paid by petitioner after January 1, 1948, were credited to the general fund of the City of Columbus and expended therefrom by the City of Columbus.

Shortly after the inception of the meat inspection fee, an action was filed by meat packers, other than petitioner, to enjoin its collection. The Franklin County Court of Appeals in that action, which is entitled *Brunner vs. Rhodes*, 95 Ohio Appeals, 259 (Appendix IV herein), held that the Board of Health had no power to assess and collect the fee. The Supreme Court of Ohio refused a motion to certify in that action. Shortly thereafter the instant suit was filed against the City of Columbus and members of the Board of Health (who were later dismissed from the action) for a refund of the fees paid by petitioner under that regulation, on the ground that the fees had been paid under an illegal and unconstitutional act involuntarily and under protest and that accordingly petitioner was entitled to said refund. The case was submitted to the Franklin County, Ohio Common Pleas Court on an agreed statement of fact and the pleadings, both of which are contained in the record which has been certified to this court. The Common Pleas Court found against petitioner herein and accordingly entered judgment. The case was then appealed to the Franklin County Court of Appeals, which affirmed the judgment of the Common Pleas Court in toto and adopted the reasoning set forth in the opinion of the Common Pleas Court. An appeal as of right on constitutional questions was then filed in the Supreme Court of Ohio and also a motion to certify the record. That court

dismissed the appeal as of right on the ground that there was no debatable constitutional question and overruled the motion to certify the record.

B. How the Constitutional Question Was Presented.

The first constitutional question was raised by the action of the Ohio Supreme Court in dismissing petitioners' appeal as of right on constitutional questions.

The second constitutional question, which actually is a part also of the first constitutional question, was raised in petitioner's petition (Appendix V herein) in the trial court. The very basis of petitioner's action was the taking of its property in violation of the Fourteenth Amendment with the consequent right to recovery of that property. Thus, plaintiff's petition, after alleging the regulation of the Board of Health requiring inspection fees and the payment of the fees thereunder, contained allegations that said payment was involuntary and made under protest and then made the following statement:

> "Plaintiff says that those portions of Regulation 70-2 of the Board of Health of Columbus, Ohio City Health District and the amendments thereto which provide for imposition, assessment and collection of fees for inspection of meat and meat products are and were at all times mentioned herein unconstitutional, void and illegal, and that the Board of Health of the City of Columbus, Ohio City Health District did not at any time mentioned herein have any power or authority to assess or collect the fee for meat inspection services rendered by it. Plaintiff further says that defendant, City of Columbus, Ohio, had no right, power or authority to receive any fees for meat inspection assessed by said Board of Health or to expend any sum so received for any purpose.
>
> "Plaintiff says that the aforesaid total sum of $145,785.95 assessed against it by said Board of Health

and paid by it to the defendant, City of Columbus, was therefore illegally assessed and collected and that it is therefore entitled to have all of said sum returned to it."

Accordingly, the basic question before the trial court, the Court of Appeals and the Ohio Supreme Court was a determination of petitioner's right to property taken from it by a state agency which had no power so to do, in violation of the Fourteenth Amendment.

In the Supreme Court of Ohio, petitioner's first assignment of error read as follows:

"1. The trial court and the court of appeals erred in finding that appellant could not recover inspection fees paid by it because it could not restore the Columbus Board of Health to status quo by restoring the inspection services rendered by said board."

Thus was placed directly before the Supreme Court of Ohio the failure of the lower courts to recognize petitioner's r under the Fourteenth Amendment through their refusal, under an erroneous application of legal principles to order the refund to petitioner of monies involuntarily paid under an unconstitutional regulation of an agency of the State of Ohio. This is further emphasized when we find that under the statement by petitioner of questions of law presented (which is required by the Ohio Supreme Court in connection with the assignments of error) that the first question listed by petitioner read as follows:

"1. Can appellant recover monies paid under an illegal inspection fee regulation if the payments were involuntary?"

Finally, the fifth assignment of error before the Supreme Court read as follows:

"The judgment and decision of the trial court and the court of appeals were contrary to the law and the evidence."

This assignment in and of itself raised a constitutional question, inasmuch as the basic factor in this case, a factor which had to be determined in order to arrive at any decision of the action, was petitioner's rights under the Fourteenth Amendment as alleged in its petition in the trial court. Accordingly, the statement that the judgments below were contrary to the law automatically raised the question of the Fourteenth Amendment.

The only grounds upon which an appeal as of right to the Supreme Court of Ohio can be based is that of either federal or state constitutional questions. Consequently, since the federal constitutional question was inherent in this action, it was raised by filing of petitioner's appeal as of right to the Ohio Supreme Court. In petitioner's brief before the Ohio Supreme Court relative to the constitutional question, the following statement, among others, was made:

> "The courts below have determined that the Board of Health had no power to make or enforce the regulation assesing the inspection fee in question. The Board of Health is an agency of the State of Ohio. Accordingly, by forcing the payment of these fees by appellant without authority so to do, it was depriving appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and taking private property in violation of Article I, Section 19 of the Constitution of Ohio. This action, therefore, is for the refund of monies which appellant was forced to pay to the defendant herein in direct violation of the rights of appellant under both the United States and the Ohio Constitutions."

Petitioner also cited and quoted from *Ward v. Love County*, 253 U. S., 17, which is more fully referred to hereafter.

REASONS FOR ALLOWANCE OF WRIT

1. The Supreme Court of Ohio has, by its judgment dismissing petitioner's appeal, deprived petitioner of its rights under the Fourteenth Amendment to the Constitution of the United States.

The dismissal by the Supreme Court of Ohio of petitioner's appeal therein on constitutional questions constitutes a decision upon the merits of the case. This court has so held in *Mathews vs. Huwe*, 269 U. S., 262:

> Syllabus 1. "A decision of a state supreme court dismissing a petition in error to review a judgment of an intermediate court upon the ground that the constitutional question raised and upon which the jurisdiction of the higher court depended was not debatable (i. e. was frivolous) is a decision upon the merits so that a writ of error from this court must go to the Supreme Court and not the intermediate court."

In dismissing the appeal, the Ohio Supreme Court had before it the following information:

1. The petition which alleged a regulation by the Columbus Board of Health assessing inspection fees against plaintiff, the payment of those fees by plaintiff to the City of Columbus upon order of said Board of Health, the claim that said payment was involuntary and made under protest, the allegation that the City of Columbus took said money and used it for payment of meat inspection expenses, the allegation that said regulation was void and unconstitutional, and that the Board of Health had no right to assess said fees and that the City of Columbus had no right to receive said fees.

2. An agreed statement of fact which set forth, among other things, two ordinances duly enacted by the council of the City of Columbus, providing for the acceptance and

disposition of the funds paid by plaintiff to the city treasurer.

3. The finding by the trial court, approved by the Court of Appeals, that the Board of Health had no power to assess inspection fees, that the regulation in question was therefore illegal, and that the payments of said fees by petitioner herein were involuntary.

4. The fact that under Ohio law the Columbus Board of Health is an agency of the state, so found by the Supreme Court in *State ex rel. vs. Underwood*, 137 O. S., 1:

> Page 4. "In dividing the state into health districts, the General Assembly, in the same act, also repealed the then existing statutes which authorized municipalities to establish and appoint boards of health as part of their local governments. This, in our opinion, evidences a legislative intent to withdraw from municipalities the powers of local health administration previously granted to them, and to create in each city a health district which is to be a separate political subdivision of the state, independent of the city with which it is coterminus, and to delegate to it all the health powers thus withdrawn from municipalities. As such, the city health district becomes an agency of the state and is governed by the laws of the state."

5. The judgment of the trial court, affirmed by the appellate court, denying petitioner's recovery.

By virtue of the decision of this court in *Ward vs. Love County*, 253 U. S., 17, the judgment of the Ohio Supreme Court under such circumstances in and of itself constituted a denial to petitioner herein of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

In *Ward vs. Love County*, supra, action had been brought for refund of certain taxes which had been assessed and collected against land owned by Indians which was claimed to be exempt from taxation. The Supreme Court of Okla-

homa entered judgment against the Indians, denying them the right to refund of the taxes. This court, in reversing the Oklahoma Supreme Court, made the following statement:

> Page 24. "As the payment was not voluntary but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well settled rule that 'money got through imposition may be a recovered back; and as this court has said on several occasions' the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law independent of any statute will compel restitution or compensation.' Marsh v. Fulton County, 10 Wall., 676, 684; City of Louisiana v. Wood, 102 U. S., 294, 298-299; Chapman v. County of Douglas, 107 U. S., 348, 355. To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment which binds the county as an agency of the state."

This court again had occasion to consider the same proposition in *Carpenter v. Shaw*, 280 U. S., 363, in which it spoke as follows:

> Syllabus 5. "A denial by a state court of a recovery of taxes exacted by a state officer in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment and cannot be justified by a state statute limiting suits to recover illegally assessed taxes to taxes paid at the time and in the manner provided by law."

In its opinion, the court spoke further as follows:

> Page 369. "But the petitioner's allegations admitted on demurrer are that the tax was paid under duress

and compulsion to prevent the issue of respondent's warrant for its collection to prevent the stopping by respondent of further royalty payments to them and to prevent the accumulation of statatory penalties. These allegations are sufficient to bring the case within the ruling of this court in Ward vs. Love County, supra, that a denial by a state court of a recovery of taxes enacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment."

In our own case, it was determined by the trial court, affirmed by the appellant court, that the inspection fee was illegal and the payment thereof mad under duress and compulsion. The illegal exaction of the fees by the Board of Health therefor was in violation of the Constitution of the United States. The Board of Health was an agency of the State of Ohio. It was found to have no power to exact the inspection fees. Accordingly, its action in enforcing the illegal regulation constituted the taking by a state agency of plaintiff's property without due process of law, in direct violation of the provisions of the Fourteenth Amendment. *Home Telephone & Telegraph Company vs. City of Los Angeles*, 227 U. S., 278:

Syllabus. "The provisions of the Fourteenth Amendment are generic in terms and are addressed not only to the states but to every person whether natural or judicial who is the repository of state power. Under the Fourteenth Amendment the federal judicial power can redress wrong done by a state officer misusing the authority of the state with which he is clothed; under such circumstances whether the state has authorized the wrong is irrelevant."

Petitioner therefore was entitled to recovery of these funds from the City of Columbus, to which the payment was made and which used the funds for its own purposes. The judgment of the Ohio Supreme Court therefore violated the Fourteenth Amendment.

2. The Supreme Court of Ohio and the lower courts have erroneously decided a federal question of substance in a way not in accord with applicable decisions of this court.

This phase of the argument is directed to the basic premise upon which the decisions in *Ward vs. Love County* and *Carpenter vs. Shaw*, supra, were founded, namely, that one whose property has been taken from it by compulsion under an illegal demand has the right to have that property returned and that when the illegal demand is made by an agency of a state government, then the rights of the one whose property has been taken are protected by the Fourteenth Amendment to the Constitution of the United States. This court has, on many occasions, affirmed the right of recovery under such circumstances. The cases which have been cited heretofore make that plain. In further exposition of the court's position on this point, we cite the following from *Arkansas Building Association vs. Madden*, 175 U. S., 269, where the court spoke as follows:

> Page 273, "We assume that the payment would, under the circumstances detailed, be compulsory and not voluntary and no reason is perceived why the rule permitting recovery back would not apply."
>
> "That rule as applicable here is that an action will lie for money paid under compulsion or an illegal demand, the person being notified that his right to do so is contested. (Citing cases) The principle is thus stated by Gaines, J. in Taylor vs. Hall, 71 Tex. 213: 'The law is established that when a person by the compulsion of the cover of legal process or seizure of his personal goods pays money unlawfully demanded he may recover it back.' "

A succinct statement of the purpose of the due process clause of the Fourteenth Amendment appears in 12 Am. Jur., Constitutional Law, Section 575:

> "The primary purpose of the guarantee is the security of the individual from the arbitrary exercise

of the powers of government unrestrained by the established principles of private rights and distributive justice."

The situation which the lower courts and the Supreme Court of Ohio had before them cried out for enforcement of this guarantee. Here was an arbitrary exercise of purported powers by the Board of Health, which it had no right to do. The petitioner was at the mercy of this unauthorized exercise of power in that if it did not accede to it, petitioner would have had to go out of business. The City of Columbus had no right to accept the payments forcibly made to it by petitioner. Surely no clearer case of the application of the Fourteenth Amendment could be made. Yet in the face of such a clear-cut case, the Ohio courts refused to follow the decisions handed down time and again by this court. This matter of the application of the Fourteenth Amendment is a federal question of great substance. The Supreme Court of Ohio and the lower courts are not in accord with the decisions of this court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN L. DAVIES, JR.,
Attorney for Petitioner.

APPENDIX I

David Davies, Inc., Appellant, v. Sensenbrenner et al., Appellees.

Supreme Court—Dismissal sua sponte—No debatable constitutional question involved—Action to recover inspection fees—Paid under invalid regulation of board of health—Claim payment involuntary—Defenses—Ability to return parties to status quo—Availability—Effect of payment to city treasurer—Finding full value for inspection fees received—Section 19, Article I, Constitution—Inviolability of private property—Article XIV, Amendments, U. S. Constitution—Due process.

(No. 35743—Decided December 17, 1958.)

Statement of the Case.

The appeal as of right herein is dismissed, *sua sponte*, for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C. J., Zimmerman, Matthias and Bell, JJ., concur.

APPENDIX II

Opinion of the Court of Appeals

(Rendered March 25, 1958)

Per Curiam:

This matter comes on for consideration on an appeal on questions of law from a judgment rendered by the Court of Common Pleas of Franklin County, Ohio on February 20, 1957. David Davies, Inc., plaintiff in the court below, is

the appellant herein and Maynard E. Sensenbrenner, as mayor of the City of Columbus and others, defendants in the court below, are appellees herein. The matter was presented upon assignments of error, briefs and oral arguments as well as the transcript, stipulations and other papers in the case.

In the petition filed in the court below, plaintiff asked judgment in the amount of $145,785.95 with interest from the dates of the several payments made.

The various payments in question, recovery of which is sought in this lawsuit, were made by plaintiff pursuant to a regulation of the Board of Health of the Columbus Health District, which regulation has since been held unconstitutional.

We have examined the voluminous record in the court below and conclude that the matter was there carefully tried and a full presentation made of the issues involved. Gessaman, J. in a well-reasoned opinion, under date of January 25, 1957, held "that the defendant, City of Columbus, is not and cannot be held liable for the monies paid by the plaintiff to the city treasurer as custodian for the City Board of Health." He further held that plaintiff was not entitled to recovery. We are in accord with the reasoning of the decision of the court below and believe that no useful purpose will be served by a restatement of the principles set forth.

It is therefore the opinion of this court that the several assignments of error of the plaintiff-appellant are not well taken and must be overruled.

Petree, P. J., Bryant and Miller, JJ., concur.

APPENDIX III

Opinion of Common Pleas Court.

By Gessaman, J.

The petition in this case was filed against the defendant, Maynard E. Sensenbrenner and five other individuals as members of the Board of Health of the Columbus Ohio City Health District and the City of Columbus.

On November 7, 1956, all of the defendants, except the City of Columbus, Ohio, were dismissed by mutual agreement.

The substance of the petition is that during the period between May 1, 1947 and October 31, 1953, the plaintiff paid to the defendant, City of Columbus, the sum of $145,785.95, as inspection fees for the inspection of meat and meat products, all of which fees were assessed against plaintiff by virtue of the provisions of Regulation 70-2 and the amendments thereto, adopted by the Board of Health of the Columbus City Health District on and subsequent to November 30, 1947. The plaintiff prays judgment against the defendant, City of Columbus, in the amount above indicated.

The answer of the defendants sets up five defenses, the first one of which is a general denial. The second one alleges that there was sufficient authority for the establishment of meat inspection and the fees charged therefor. The third defense alleges that these inspection services were accepted by the plaintiff; that such inspections were a necessary adjunct of the plaintiff's business; that the inspection services were reasonably worth the sum paid by the plaintiff and that by reason of these facts, the plaintiff is estopped to deny the validity of the assessments. The fourth defense is that the plaintiff is guilty of laches and

the fifth defense sets up the defense of the Statute of Limitations.

It is conceded that this law suit was inspired by the decision of the Court of Appeals of this district in the case of Brunner, d. b. a. etc. v. Rhodes, Mayor et al, 95 Oh Ap 259; 53 O. O. 193. A motion to certify the record in that case was overruled by the Supreme Court on October 21, 1953. In that case the Court of Appeals held that a city board of health was without authority to prescribe a regulation requiring the payment of inspection fees by meat packers. The plaintiff, it is alleged and admitted, operates a meat packing plant. The fees involved in that case are the same type and were levied and assessed under authority of the same regulation as those in the case at bar.

In the last paragraph of the opinion in the Brunner case, we find the following language:

"It may be that because of our findings, plaintiffs, as a matter of law, are entitled to an order requiring the defendants to return the money paid to them as inspection fees under the ordinances. We are disposed to exercise whatever discretion we have in refusing to make such an order as to all sums paid under protest, first, because it would be futile, and, second, because it would not be equitable. The plaintiffs have received full value for the funds paid for inspections. * * *"

Considering the fact that the Brunner case was an action for a declaratory judgment, it would seem, at first blush, that the language of the Court of Appeals would be authority for a recovery of the fees paid, in an action at law. It is true that the Court of Appeals held that the inspection fees, which had been paid by the plaintiffs in the Brunner case, were paid under protest and were therefore involuntary payments. Since the payments made by the plaintiff in the case at bar were made with substantially

the same type of protest, we conclude that they likewise were involuntary payment. We consider it quite essential, however, that this Court carefully weigh the language of the Court of Appeals in the Brunner case, to the effect that it would not be equitable to order the return of the money paid to the plaintiffs as inspection fees for the reason that the plaintiffs "have received full value for the funds paid for the inspections." The same finding must be made in the case at bar. We base that conclusion not upon the finding of the Court of Appeals in the Brunner case alone, but also upon paragraph 14 of the Agreed Statement of Facts which discloses that 85% of the meat and meat products sold by David Davies, Inc. were sold in cities and communities where the inspection of meat was required either by regulation or ordinance, or by the stores to which the meat and meat products were sold. The Agreed Statement of Facts further substantiates that the meat inspection service was rendered in full during the period in question.

These facts, in our opinion, give rise to the application of a principle which was enunciated by the Supreme Court of Ohio in the case of State ex rel. Hunt, Prosecuting Attorney, v. Fronizer et al, 77 Oh St 7, at page 16 of the opinion:

"This court is of opinion that such recovery is not authorized. The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in statu quo, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do

justice upon all persons, natural as well as artificial, and is recognized in many cases. Chapman v. County of Douglas, 107 U. S. 348; Lee v. Board of Commissioners, 52 C. C. A., 376; Bridge Co. v. Utica, 17 Fed. Rep., 316."

It is true that in the Fronizer case, the Prosecuting Attorney was attempting to recover for the county, money which had been spent under a void contract. That is the reverse of the situation involved in the case at bar. The principle, however, in our opinion, is the same, and applies equally to the case at bar. The plaintiff, David Davies, Inc., acquired possession of something of value which had been performed by the Board of Health of the City of Columbus under a regulation which later was declared to be void. It is impossible for the plaintiff to put the Board of Health in status quo. Therefore, under the principle announced in the Fronizer case, there should be no recovery. As the Supreme Court said: "The rule rests upon the principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases." This rule was followed in the case of Herzig et al. v. Hunkin Conkey Construction Company, 60 Abs. 313. In the latter case Judge Carter makes the following observation in his concurring opinion on page 316:

"The rule that the plaintiffs must place, or show readiness to place the other party in statu quo, applies to actions based on fraud, as well as violations of the statutes or ordinances by public officials in the entering into the same. To this effect see Donnelly on Public Contracts, paragraph 248, page 360, where the author states that the prevailing rule is to this effect."

In view of the fact that the plaintiff has received full value for the funds paid for inspections and in view of the further fact that it is obviously impossible for the

plaintiff to put the defendant, Board of Health, in status quo, it is our opinion that the rule of the Fronizer case should be applied and that the plaintiff should be denied the right to recover the money paid for inspection.

There is a further reason why the plaintiff may not recover in the case at bar. In the case of State, ex rel. Mowrer v. Underwood et al, 137 Oh St 1, we find the following syllabus:

"When the state, by legislative enactment, withdraws from cities the health powers previously granted to them and transfers them to newly created city health districts, such health districts become agencies of the state government, and their employees are governed by state law."

The opinion of the Supreme Court as to status of City Health Districts is declared with no uncertainty in the following language found on page 5 of the opinion:

"This, in our opinion, evidences a legislative intent to withdraw from municipalities the powers of local health administration previously granted to them, and to create in each city a health district which is to be a separate political subdivision of the state, independent of the city with which it is coterminus, and to delegate to it all the health powers thus withdrawn from municipalities. As such, the city health district becomes an agency of the state and is governed by the laws of the state."

The Court of Appeals of this district in the case of Brunner v. Rhodes, supra, recognized this same fact in the use of the following language found at page 272 of the opinion:

"Especially is this true inasmuch as the Hughes and Griswold Acts made the health districts which they created agencies of the state government. State, ex rel. Mowrer, v. Underwood et al, Civil Service Commission of the City of Akron, 137 Oh St 1, 27 N. E. (2d), 773."

As early as 1921 the Supreme Court considered the health laws in question in the case of State, ex rel. City of West Park v. Zangerle, Auditor, 103 Oh St 566. In this case the City of West Park by an action in mandamus was seeking a writ commanding the Auditor to turn over to it, the City of West Park, certain monies collected by him. At page 584 of the opinion, the Court held as follows:

"If it should be conceded that this contention is sound, then we think it is clear that under the statute the health district would be entitled to the money, and not the municipality."

The fact that the fees involved in the case at bar were paid by the plaintiff to the Treasurer of the City of Columbus is of no importance for by virtue of the provisions of §1261-38 GC. "The treasurer of a city which constitutes a health district shall be the custodian of the health fund of such city health district." The Treasurer of the City of Columbus, therefore, in accepting and receiving the fees from David Davies, Inc., was accepting and holding them as custodian of the health fund of the "City Health District." He did not receive or hold them for the City of Columbus.

In addition to providing that the Treasurer shall act as custodian of the funds of the Health District, the General Assembly also provided in §1261-38 GC, that the auditor of a city which constitutes the City Health District, shall act as the auditor of the City Health District. It provided further in the same section that the expenses of a board of health or health department of a city health district, shall be paid on the warrant of the auditor of the city issued on vouchers approved by the Board of Health or the Health Department of the City Health District and signed by the City Health Commissioner. Furthermore,

in §4418 GC, the Legislature provided in part that "all fines collected under this chapter shall be paid to the treasurer of a municipality and credited to the Sanitary Fund of the Board of Health instituting the prosecution."

It is true that §4451 GC, provided that "When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified." The duty thus imposed upon the council of a city does not, in our opinion, alter the independent status of a city board of health. Sec. 4451 GC, was in effect when all of the decisions above referred to were handed down.

It is our opinion, therefore, that all of the monies paid by David Davies, Inc., as meat inspection fees during the period in question were paid to the Treasurer of the City of Columbus as custodian for the Columbus City Health District and that the latter was a political entity separate and apart from the City of Columbus.

In Par. 16 of the Agreed Statement of Facts, it is stipulated that "all of the fees collected from meat inspection were dispersed in payment of the expenses of the Meat Inspection Division of the Board of Health in the same manner as were all disbursements made by the City of Columbus and the deficit was paid by additional appropriation from the General Fund of the City of Columbus." Granting that we may assume that because of the receipt of fees by the Board of Health, the defendant, City of Columbus, received smaller demands for appropriations under the provisions of §4451 GC, and thereby received some indirect benefit from the fees that were paid by David Davies, Inc., we are of the opinion that such indirect benefit, if any, cannot be the basis of a judgment against

the City of Columbus for the amount of the fees paid by the plaintiff. A judgment against the City of Columbus could not be based upon such an indirect benefit.

Counsel for the plaintiff have contended that the meat inspection service was a city operation because of, among other things, three ordinances passed by the council of the City of Columbus as set forth in Exhibits E, F and G, which are attached to the Agreed Statement of Facts. Exhibit E is Ordinance No. 204-47 "to establish a meat inspection fund." The substance of this ordinance is that all meat inspection charges paid to the City Treasurer shall be credited to the Meat Inspection Fund and that the City Auditor be authorized to establish such fund. Exhibit F is Ordinance No. 286-47 "to make appropriations for the seven months period beginning June 1, 1947, and ending December 31, 1947, for the Meat Inspection Fund." This ordinance appropriated monies from the Meat Inspection Fund to certain operating purposes specified in the ordinance and provided the methods by which the money would be withdrawn from the funds. In view of the status of the City Health District, it is questionable as to whether or not this ordinance was essential. It does not, however, alter the independent status of the City Board of Health. The same observation may be made of Exhibit G which is Ordinance No. 2-48 "to establish certain divisions in the Department of Health and Sanitation and provide for appropriations thereto." None of these acts of City Council could change the status of the City Board of Health.

It is our opinion, therefore, that the defendant, City of Columbus, is not and cannot be held liable for the monies paid by the plaintiff to the City Treasurer as custodian for the City Board of Health.

For the reasons given, it is our opinion that the plaintiff may not recover in this action. In view of the fact that a jury has been waived and the case has been submitted to the Court upon the pleadings and the Agreed Statement of Facts, the Court finds in favor of the remaining defendant, the City of Columbus. An entry may be drawn accordingly and exceptions noted.

APPENDIX IV

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Douglas Brunner, d/b/a Brunner Meat Packing, et al., Plaintiffs-Appellees, v. Mayor James A. Rhodes, et al., as members of the Board of Health of Columbus, Ohio, City Health District, Defendants-Appellants.

. . . . . .

Opinion

(Rendered on the 23rd day of March, 1953.)

By the Court.

This is a de novo appeal from a judgment of the Common Pleas Court in favor of the plaintiffs.

The issues are drawn on an amended petition, answer thereto, a supplemental petition, a second supplemental petition and a joint answer thereto, a reply and a supplemental reply. The supplemental pleadings were made necessary because of certain regulations of the defendants enacted subsequent to the filing of the amended petition.

Plaintiffs, by their pleadings, seek a declaratory judgment defining their rights under certain regulations providing for the inspection of slaughter houses, meat and meat products. The plaintiffs are individuals, partnerships and corporations engaged in meat packing and the

slaughter of meat animals and the distribution and sale of the meat all of whom are affected and are required to pay fees, as provided, by the regulations.

The plaintiffs question the validity and therefore the enforceability of the several regulations involved insofar as they require payment of permit and inspection fees by plaintiffs. The contentions of the plaintiffs are set forth under four headings:

(1) The purported regulations of the board of health were not properly adopted and are, therefore, invalid.

(2) The board of health is without authority to impose fees for inspection which they have attempted to impose.

(3) The regulations generally are unreasonable, discriminatory, and usurp the legislative function.

(4) Plaintiffs-appellees are entitled to recover meat inspection fees paid by them.

Four regulations are involved. The first, of date March 31, 1947, effective May 1, 1947; the second, of date November 30, 1947, effective January 1, 1949; the third, of date March 10, 1950, effective on and after May 1, 1950, and the fourth, of date April 27, 1950, effective May 1, 1950. It is urged that the first regulation is invalid because it was not read on three separate occasions nor was the reading on three separate occasions dispensed with by a three-fourths vote and that it was not properly enacted as an emergency measure. The second regulation is claimed to be ineffective because it was not read on three separate occasions nor was there any waiver of such requisite. It was not published and its purported effective date is contrary to the statute. The third regulation is asserted to be invalid because it was not published and although an emergency was claimed to exist in the preamble, there is no stating of an emergency or reasons therefor in a separate section and it purports to contain an effective date which was contrary to the legally effective date. The fourth regulation

is questioned in that, although an attempt was made to declare an emergency in Section Twenty-six of the ordinance, no reasons were declared or set forth for the emergency. There was no publication and it purported to be effective at a date which was contrary to law.

The authority of the defendant Board of Health to adopt orders and regulations and the procedure to be followed is set out in Section 4413, G. C.:

> "The board of health of a city may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, * * * * *
>
> Orders and regulations not for the government of the board, but intended for the general public shall be adopted, advertised, recorded and certified as are ordinances of municipalities, * * *, Provided, however, that in cases of emergency caused by epidemic of contagious or infectious diseases, or conditions or events endangering the public health, such boards may declare such orders and regulations to be emergency measures, and such orders and regulations shall become immediately effective without such advertising, recording and certifying."

It thus becomes necessary to determine how ordinances are adopted by municipalities as contemplated by G. C. 4413. This procedure is found in Section 4224, G. C., which, in so far as pertinent, provides:

> "The action of council shall be by ordinance or resolution, and on the passage of each ordinance or resolution the vote shall be taken by 'yeas' and 'nays' and entered upon the journal, * * * * No * * ordinance * * of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, * * * * *, shall be passed, unless it has been fully and distinctly read on three different days, and with respect to such * * ordinance * *, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected

> thereto, taken by yeas and nays, on each * * ordinance, and entered on the journal. No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto."

Provision for the adoption of emergency ordinances, in so far as is pertinent, is found in G. C. 4227-3:

> "Emergency ordinances and measures necessary for the immediate preservation of the public * * health * * shall go into immediate effect. Such emergency ordinances * * must, upon a yea and nay vote, receive a vote of two-thirds of all the members elected to the council or other body corresponding to the council of such municipal corporation, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure."

There is no dispute that in the enactment of a regulation of the Board of Health other than an emergency regulation, the procedural requirements of G. C. 4224 must be followed, but it is urged by the defendants that the proviso in G. C. 4413 exempts the Board from the observance of the procedural requirements of that part of the section preceding the proviso.

The first mention of emergency ordinances is found in 102 O. L. 521, enacted March 31, 1911. The emergency provision as now found in G. C. 4427-3 was enacted as an amendment to 102 O. L. 521 and was effective April 28, 1913. The proviso in G. C. 4413 is first found in the Hughes Act, 108 O. L. Pt. 1, 236, 248, effective May 12, 1919, and later in the Griswold Act, 108 O. L., Pt. 2, 1092, effective January 2, 1920. Thus, when the emergency proviso was carried into G. C. 4413, the Legislature acted with full appreciation of the emergency requirements as to the enactment of ordinances of municipalities which legislation had then been effective for more than six years.

It will be noted that if the Board observes the requirements of the proviso in G. C. 4413 in enacting emergency legislation, it thereby avoids the necessity of advertising, recording and certifying the regulation but there is still left in the language of the earlier part of the section the obligation that regulations intended for the general public shall "be adopted as are ordinances".

The emergency provision of G. C. 4413 is a part of the general enactment investing the Board with authority to make regulations and defining procedure, mainly by reference. The proviso in this section is silent as to procedural requirements.

It has been held in Goodman v. Youngstown, et al., 24 O.L.A. 696, that in the enactment of a city ordinance

> "The mere statement that it is necessary for the preservation of the public peace, health and safety is but a conclusion of the council, without the statement of any reason therefor."

See, also, Maloney v. Gutelius, et al., 30 O.L.A. 432.

Notwithstanding this holding, we believe that if either of the reasons authorizing an emergency regulation, or facts which require the conclusion that one of these reasons exists is found by the Board of Health, it will meet the requirements of the proviso in G. C. 4413. These conditions are, either that an emergency exists which is caused by epidemic of contagious or infectious diseases or by conditions or events endangering the public health. Observance of this requirement by the Board will preclude the Court from questioning the necessity that the regulation go into immediate effect. Holcomb, Auditor of the City of Massillon v. State, ex rel. Coxey, Sr., 126 O. S. 496, 3rd Syl.

Let us examine the various ordinances in the light of the construction of G. C. 4413 which we have heretofore indicated. The first regulation, dated March 31, 1947, was

stated to be effective May 1, 1947. One of the prime purposes of emergency legislation is that there is necessity that it immediately be effective. It was inconsistent with the emergency feature of the regulation to fix its effective date more than a month after its enactment. However, if it was an emergency, it may be held to have been effective when properly enacted.

It is urged by the defendants that this regulation was properly enacted as ordinary legislation, in that there was a compliance with the obligation that it be read on three different days and that it be published. The readings on three different days was mandatory to the enactment of an ordinary regulation. Campbell v. Cincinnati, et al., 49 O. S. 463. But it is contended that compliance with the requirement as to the readings does not have to be entered on the record of the Board. With this we agree. It is further claimed that proof of these readings is found in the stipulation. With this contention we cannot agree. The most that can be inferred from the stipulation is that the Board had it under consideration and probably discussed it at three meetings but this is far from the requisite proof that it was read in its entirety at each and every one of these meetings. Proof of the readings of the regulation was susceptible of direct evidence which, it would seem, may have been forthcoming from some member or the Secretary of the Board, if if were a fact. The effective date of the regulation cannot be inferred from the stipulation as to the publication, nor does the record of the Board show any vote to dispense with the readings of the regulation.

This regulation recites the reasons for the emergency and indirectly requires the conclusion that conditions endangering the public health exist and it is declared to be

an emergency regulation. It received the vote of all but one of the members of the Board. We find that this regulation was procedurally valid.

The second regulation, dated November 30, 1948, does not purport to be an emergency measure, nor was it adopted in the manner required for a regulation other than an emergency. This regulation differed from the first in that it fixed a minimum inspection fee of $3.00.

The third regulation, dated March 10, 1950, was procedurally valid for the same reasons as the regulation of March 31, 1947.

The fourth regulation, dated April 27, 1950, is invalid. It does not meet the requirements of an emergency measure and was not published.

The second contention of plaintiffs is that the Board of Health was without authority to impose fees for inspection as provided in the regulations.

This contention is directed to that part of the regulations which impose upon packers and slaughterers of meat a fee for the services to be rendered in the inspection of their slaughter houses and the animals before and after killing.

The first regulation fixed the fees for inspection at 35¢ for each carcass of cattle and 15¢ for each carcass of other animals. The second regulation fixed the minimum fee for inspection at $3.00. Subsequent regulations reduced the charges for each carcass of cattle inspected to 25 cents and other animals to ten cents.

It is the claim of plaintiffs that the extent to which the Board may charge inspection fees is found in G. C. 4459 and that it has no authority to require payment by way of inspection fees from the plaintiffs upon any other theory.

G. C. 4459 in part provides:

> "The Board of Health shall keep for public inspection a record of the names, residence and places of business of all persons engaged in the sale of * * meat, and may require permits, *after inspection* to vend * * meat, to be renewed semi-annually for which a charge of not more than 50¢ may be made." (Emphasis ours)

The fee herein authorized is a permit fee and that part of the section which we have underscored is convincing that it does not intend to include inspection fees.

Manifestly, the cost of such services would be so greatly in excess of $1.00 per year as to make the payment of such sum entirely inadequate to cover the expense of inspection of carcasses of animals before and after slaughter or of meat preparatory to retail to the consumer.

Much has been said pro and con as to the public character of the services rendered under the provisions of the regulations. It is true that they are, and could be considered as of a public character, for the purpose of raising the funds with which to pay for the services to be rendered by the terms of the regulations but that fact does not preclude the conclusion that persons engaged in the slaughtering or vending of meat receive by inspection a service over and beyond that which inures to the benefit of the general public. This fact was recognized and inspection fees required to be paid by slaughtering establishments in the City of Dayton by a municipal ordinance, enactment of which was held to be within the police power of the city, in City of Dayton, et al., v. Jacobs, 120 O. S. 225.

The legislation under consideration in the Jacobs case was a municipal ordinance and does not reach nor determine the question here presented, namely, the power of the Board of Health by legislation to exact inspection fees

from slaughterers. This case was decided almost ten years after the enactment of the Hughes and Griswold Acts. In the Jacobs case, the Court also disposed of the contention that the fee there prescribed was a tax and held that it was but an inspection fee intended to produce sufficient return to take care of the reasonable expenses of the inspection provided in the ordinance. The regulations here under immediate consideration were expressly designed to accomplish that purpose but the Jacobs case affords no support for the authority of the Board of Health to fix and collect inspection fees.

What power then has the Board of Health under the applicable provisions of the Code? It is basic that the Board of Health being a creature of statute has only such powers as are expressly conferred upon it and those which may be fairly implied from the express powers granted. State, ex rel. Hunt v. Hildebrant, 93 O. S. 1; State, ex rel. Clark v. Cook, 103 O. S. 405. A fair and reasonable doubt as to the existence of the power to enact an ordinance should be resolved against the city (Ergo, the same rule as to a Board of Health.) 62 C.J.S. 88.

G. C. 4458 provides:

> "The board of health may appoint, define their duties and fix the compensation of, such number of inspectors of dairies, slaughter houses, * * * * *, meat, * * * *, and such other persons as is necessary to carry out the provisions of this chapter."

Were there no other provision of the Code than that to which we have just referred it might with some plausibility be urged that the Board, having been given the power to name inspectors of slaughter houses and of meat, would have the implied authority to implement these powers by legislation which would finance such services. But the

same act which includes G. C. 4458 also carries Section 4451, G. C., which provides:

> "When expenses are incurred by the Board of Health *under the provisions of this chapter*, upon application and *certification* of such Board, the council shall pass the necessary appropriation ordinances to pay the expense so incurred and certified. * * *" (Emphasis ours)

Many appointments are authorized to be made in the chapter under the heading Board of Health among which are health commissioner, public health nurses, clerks, other persons and sanitary officers.

In State, ex rel. Miller v. Council of Massillon, 2 O.C.C. (N.S.) 167, the salary of a health officer appointed by the board of health was held to be "expense incurred" under Section 2140, R. S., now G. C. 4451. This latter section was not affected by the Hughes and Griswold Acts. The appointment of inspectors for slaughter houses which were necessary to effectuate the regulations here under consideration may well be held to be "expenses incurred". This obligation of the city council to enact the necessary ordinances to produce the money to pay the expenses incurred by the board of health is almost as old as the legislation creating boards of health.

In 66 O. L. 200, et seq., enacted in 1869, Section 325 of the act provides that,

> "Where expenses shall be incurred by the Board of Health, under the provision of this act, it shall be the duty of council, to pass the necessary appropriation ordinances to pay the expenses so *incurred* and *certified*." (Emphasis ours)

This act did not provide for the appointment of inspectors of slaughter houses and meat but did authorize the appointment of many other officers. On April 20, 1874, 71

O. L. 158, at 160, a similar provision, as to the payment of expenses by appropriation of council, is found and also in this act in Section 318, page 160, the board of health is given authority to name sanitary officers, inspectors of milk and meat, market masters, provides for inspection of dairies, including the cows, cow stables, milk houses and milk vessels thereof, the owners of which shall offer for sale milk within the corporate limits of the city. This legislation did not have application to cities of the first grade of first class but it does disclose the legislative purpose as to the source of payment for expenses incurred by boards of health of other cities.

In 95 O. L., page 421, et seq., effective May 7, 1902, is found a comprehensive act treating the subject of health. Therein, probably for the first time, is a section 2139, page 433, authorizing the board of health to appoint inspectors of slaughter houses along with other inspectors, the appointment of which had theretofore been authorized. It is in this same section, and as a part of it, that provision is made for the issuance of semi-annual permits as now provided by G. C. 4459. It is significant that in this act the words "after inspection", as now found in G. C. 4459, do not appear. Section 2138, page 433 of this act also provides for the payment of expenses incurred by the board of health by appropriation ordinances enacted by the council. There clearly runs through all of this health legislation an intendment that the expenses incurred by boards of health of cities in carrying out their delegated duties shall be borne by action of the council. This specific obligation being enjoined upon the council it follows that the board of health has no implied power to raise such funds by collection of permit fees. This conclusion is further heightened by the Hughes and Griswold Acts creating city health districts and general health districts.

The Hughes and Griswold Acts creating these districts, G. C. 1261-16 to 1261-43, G. C., set forth complete and comprehensive procedure controlling the fiscal policy of the general health districts but left the municipal health districts, in such matters, subject to the law relating to boards of health for municipalities. Sections 4404 to 4476, inclusive, which sections as we have heretofore indicated, though amended by the Hughes and Griswold Acts had, in substantially the same form long antedated these acts. It is of interest to note that in the sections relating to health districts, G. C. 1261-16 to 1261-43, inclusive, but *one, G. C. 1261-16, has any application* to a city health district.

It is inferable that, unless the letter of the statutes controlling the respective health districts requires a different construction, it would be the purpose of the State legislation that like procedure be followed in financing the public services which both health districts are authorized and required to perform. Especially is this true inasmuch as the Hughes and Griswold Acts made the health districts which they created, agencies of the State Government. State, ex rel. Mowrer v. Civil Service Commission of the City of Akron, et al., 137 O. S. 1.

In the provisions relating to general health districts there is a new section, G. C. 1261-40 which provides for an annual estimate of current expenses by the board of health of such districts. This estimate is to be made annually on or before the first Monday in April for the year beginning the first day of January next ensuing, and is to be *itemized* and *certified* to the County Auditor and by him submitted to the Budget Commission * * * * *. (Emphasis ours) This provision requiring an annual budget of the expenses by the Board of Health of a general district although much more detailed than G. C. 4451 is, in our judg-

ment, practically the same in purpose and is convincing that it was the intent of the legislation that the expenses of neither municipal nor general health districts should be raised by them but should be referred to the council and the budget commissioners respectively for allowance. Similar provision is made in G. C. 1261-40 where a general health district has been united with a city health district located therein.

It is urged by defendants that the provision of G. C. 4451 that the council shall pass the necessary appropriation ordinances to pay expenses incurred by the Board upon "application" and "certificate" from the Board, implies that there may be expenses incurred other than those to be certified. This language, heretofore underscored, has been employed throughout practically all of the health legislation. We are of opinion that it is the intendment of the statute that all expenses incurred by the city board of health, unless otherwise expressly provided, shall be paid from appropriation ordinances of the city council and that such expenses for the purposes of certainty are required to be certified.

Several courts of the State have had questions under consideration similar, at least, to the one which we are now considering and have resolved them as we have determined the issue here. These cases are Spangler, dba Pure Milk Dairy v. Teeple, et al., No. 32233, Common Pleas Court of Wood County, unreported, opinion by Judge Sloether; Realty Co. v. City of Youngstown, 118 O. S. 204, and Judge Rutherford in this case in the Common Pleas Court.

Upon the third contention of plaintiffs that the regulations generally are unreasonable and discriminatory, we find against them.

The fourth contention is that the plaintiffs are enfitled to recover meat inspection fees paid by them. This claim is met by the defendants with the charge that the fees were paid voluntarily. They cite Ratterman v. Express Co., 49 O. S., 608; Toledo v. Buechele, 19 O. C. C., 127; State, ex rel. Pulscamp v. Commissioner, 119 O. S., 504; Whitbeck v. Minch, 48 O. S., 210. Plaintiffs likewise rely upon Ratterman v. Express Co., 49 O. S., 608, supra, and Toledo v. Buechele, 19 O. C. C., 127, supra. Without analyzing these cases, we are satisfied to say that in our judgment the payments of the inspection fees by the plaintiffs with, and after, their notices that they were paid under protest were involuntary payments. This is true because of the provisions of the regualtion under which the plaintiffs would have been denied the benefit of the inspection services had they not paid the prescribed fees and also would have been subject to prosecution and punishment under the penal provisions of the regulation.

It may be that because of our findings, plaintiffs are, as a matter of law, entitled to an order requiring the defendants to return the money paid to them as inspection fees under the ordinances. We are disposed to exercise whatever discretion we have in refusing to make such an order as to all sums paid under protest, (1) because it would be futile; (2) because it would not be equitable. The plaintiffs have received full value for the funds paid for inspections. However, the fees impounded by the decree of the Common Pleas Court will be ordered paid to the plaintiffs.

Counsel will draw a judgment entry conformable to this opinion.

Wiseman, P. J., Miller and Hornbeck, JJ., concur.

APPENDIX V

Petition Filed in the Common Pleas Court

Now comes David Davies, Inc., plaintiff herein, and for its petition says that it is and was at all times herein mentioned a corporation duly organized, existing and doing business under the laws of the State of Ohio, and that its principal business is the slaughtering and processing of meats and meat products.

Plaintiff says that defendant City of Columbus, Ohio, is and was at all times herein mentioned a municipal corporation duly organized and existing under and by virtue of the laws of the State of Ohio. Defendants Russell E. Rebrassier, Charles M. Henry, Dr. Lovell W. Rohr, Charles A. Jones, and Dr. Eldred B. Heisel are the duly appointed, qualified, and acting members of the Board of Health of the City of Columbus, Ohio, City Health District, and the defendant, Maynard E. Sensenbrenner is mayor of the City of Columbus, Ohio and by virtue of his office a member of the Board of Health of the Columbus, Ohio, City Health District.

Plaintiff says that on March 31, 1947 the Board of Health of the Columbus, Ohio, City Health District, passed and adopted Regulation 70-2 providing among other things for the assessment and collection of fees for meat inspection services provided by said Board of Health. Amendments to said regulation were passed and adopted by said Board of Health on November 30, 1947, March 10, 1950 and April 27, 1950. Copies of said Regulation 70-2 and said amendments thereto are attached hereto marked "Exhibit A" and made a part hereof as fully as if written herein.

Plaintiff say that on April 21, 1947 the Council of the City of Columbus, Ohio passed Ordinance No. 204-47 and

that said ordinance was approved by James A. Rhodes, mayor, on April 22, 1947. A copy of said ordinance is attached hereto marked "Exhibit B" and made a part hereof as fully as if written herein.

Plaintiff says that pursuant to aforesaid regulation and said amendments thereto said Board of Health during the period between May 1, 1947 and October 31, 1953 assessed against plaintiff monthly charges in the total amount of $145,785.95 for meat inspection services rendered to plaintiff by said Board of Health during said period. Plaintiff further says that, in accordance with the provisions of said regulation and said amendments thereto, it paid to the defendant, City of Columbus, Ohio, said monthly charges totalling $145,785.95 so assessed against it.

Plaintiff says that Section 6 of Regulation 70-2 of said Board of Health provided that upon failure to pay said meat inspection fees provided therein, inspection service would be withdrawn until payment was made. Regulation 70-1 of said Columbus Board of Health, a copy of which is attached hereto marked "Exhibit C" and made a part hereof as fully as if written herein, and regulations of the Boards of Health in many other cities in which David Davies, Inc., sells its meat and meat products prohibit the sale of meat which has not been inspected. A withdrawal of meat inspection, therefore, from plaintiff for failure to pay said meat inspection fees would have resulted in the cessation of plaintiff's business. Plaintiff was, therefore, forced to pay said fees in order to continue its business.

Plaintiff says that all of the sums paid to the defendant City of Columbus for meat inspection services pursuant to aforesaid regulation and said amendments thereto were paid under written protest, said protest alleging that said fees and the assessment and collection thereof were illegal and that the Board of Health of the City of Columbus,

Ohio Health District had no right, power, or authority to levy, assess or collect any fees for meat inspection services rendered by it, that said fees were paid only to prevent a cessation of the business of plaintiff, and that plaintiff did not waive any right to file suit for recovery of the payments so made.

Plaintiff says that those portions of Regulation 70-2 of the Board of Health of the Columbus, Ohio, City Health District, and the amendments thereto which provide for imposition, assessment and collection of fees for inspection of meat and meat products are and were at all times mentioned herein unconstitutional, void and illegal and that the Board of Health of the City of Columbus, Ohio, City Health District, did not at any time mentioned herein have any power or authority to assess or collect a fee for meat inspection services rendered by it. Plaintiff further says that defendant City of Columbus, Ohio had no right, power or authority to receive any fees for meat inspection assessed by said Board of Health, or to expend any sums so received for any purpose.

Plaintiff says that the aforesaid total sum of $145,785.95 assessed against it by said Board of Health and paid by it to the defendant City of Columbus was, therefore, illegally assessed and collected and that it is, therefore, entitled to have all of said sum returned to it.

Wherefore, plaintiff prays that judgment be rendered in its favor and against said defendants in the amount of $145,785.95 with interest thereon from the dates of the individual payments of said amount and for its costs herein expended.

(Note: Exhibits A, B and C which are referred to in the petition appear in the record of this case which was certified to this court.)

APPENDIX VI

Judgment Entry of Ohio Supreme Court

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Franklin County, as upon the motion of the appellees to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed pro sponte for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellees recover from the appellant their costs herein extended, taxed at $.....

Ordered, that a special mandate be sent the Court of Common Pleas of Franklin County, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Franklin County, "for entry".

I, Elliot E. Welch, clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court, this 24th day of December, 1958.

Elliot E. Welch,
Clerk of the Supreme Court of Ohio.

FILE COPY

No. [redacted]723

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

DAVID DAVIES, INC.,

Petitioner,

vs.

MAYNARD E. SENSENBRENNER, ETC., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 703

DAVID DAVIES, INC.,

Petitioner,

vs.

MAYNARD E. SENSENBRENNER, ETC., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Material Facts

Basically the statement made by petitioner in its brief is correct so that respondent considers it unnecessary for it to repeat at length the background facts involved.

The petitioner commenced this action in the Common Pleas Court of Franklin County, Ohio, in August, 1954 to recover meat inspection fees paid by it between May 1, 1947 and October 31, 1953, purusant to a regulation of the Board of Health of the Columbus, Ohio, City Health District, which regulation had been declared invalid by a prior decision in a case to which petitioner was not a party.

Petitioner joined as defendants the members of the Board of Health of the Columbus, Ohio, City Health District, the Mayor of the City of Columbus, Ohio, and the City of Columbus, Ohio, Subsequently, on November 7, 1956, the petitioner voluntarily dismissed all the defendants except the City of Columbus, Ohio, and proceeded to trial solely against the said City of Columbus, Ohio. The City of Columbus, Ohio, is a municipal corporation; the Columbus, Ohio City Health District is a political subdivision of the State of Ohio, separate and distinct from the City of Columbus, Ohio. The fees were paid to the treasurer of the City of Columbus, who also was the custodian of the funds of the Columbus, Ohio, City Health District.

B. No Constitutional Question Decided.

The Ohio courts have consistently held in this action that the payments made by petitioner were made to the Columbus, Ohio City Health District and not the City of Columbus, Ohio, and that accordingly the petitioner could not recover from the respondent, City of Columbus, Ohio, fees paid to another political subdivision of the State of Ohio.

The Ohio courts have also consistently held in this action that the petitioner received benefits for the fees paid substantially equal to the amount paid and could not replace the Columbus, Ohio City Health District in status quo, and that under Ohio law this precludes recovery of the fees paid.

The courts held that either ground was sufficient to preclude recovery by petitioner. Neither the Common Pleas Court nor the Court of Appeals discussed or decided any constitutional question. The only vestige of a constitutional question being decided by any Ohio court was the

dismissal of petitioner's appeal by the Ohio Supreme Court upon the grounds that no debatable question is involved. Basically, that also is the contention of respondent.

REASONS WHY THE WRIT SHOULD BE DENIED

1. No Federal Question has been Decided by the Ohio Courts, but they have Based their Decisions on the Adequate State Grounds that the Payments, Recovery of Which is Sought, were not made to this Respondent.

The petitioner, David Davies, Inc., has appended to its petition for a writ of certiorari, copies of the opinions of the Tenth District Court of Appeals and the Franklin County Common Pleas Court. (See appendixes II and III of the petition). A reading of these opinions reveals that they contain no reference to any Federal Constitutional question. Petitioner has likewise included as appendix VI of the petition for a writ of certiorari a copy of the judgment entry of the Ohio Supreme Court. For the benefit of the court, respondent has included as appendixes I and II to this brief copies of the judgment entries of the Tenth Dsitrict Court of Appeals, and the Franklin County Common Pleas Court.

A reading of these entries and opinions clearly reveals that the Ohio courts decided the instant action upon two grounds, either of which standing alone is sufficient to sustain a judgment denying recovery by petitioner. At this point we shall consider only one of these grounds, namely, that the petitioner made no payments to the respondent, City of Columbus, Ohio. This conclusion is almost axiomatic that no recovery can be had for payments involuntarily made from a third party not a party to the transaction. Petitioner argued that some sort of privity

should be found, but the Ohio courts denied this contention. Basically, the Ohio courts stated, in this regard, that the petitioner had brought the wrong defendant into court and should have maintained its action against the Columbus, Ohio, City Health District. Petitioner itself created this condition purely voluntarily by dismissing the members of the Board of Health of the Columbus, Ohio, City Health District. In this regard, we quote briefly from the opinion of the Franklin County Common Pleas Court:

> "• • • It is our opinion, therefore, that all of the monies paid by David Davies, Inc., as meat inspection fees during the period in question, were paid to the treasurer of the City of Columbus as custodian for the Columbus City Health District and that the latter was a political entity separate and apart from the City of Columbus. • • •
>
> "It is our opinion, therefore, that the defendant, City of Columbus, is not and cannot be held liable for the monies paid by the plaintiff to the city treasurer as custodian for the City Board of Health • • •."

That the Columbus, Ohio, City Health District is a political subdivision separate and distinct from the City of Columbus, Ohio, is established by Ohio law and conceded by petitioner. (See numbered paragraph 4 on page 11 of the petition for a writ of certiorari.); *State ex rel. Mowrer v. Underwood*, 137 Ohio St. 1; 27 N. E. 2d 773; *Brunner d.b.a. Brunner Meat Packing et al v. Rhodes, Mayor, et al.*, 95 Ohio App. 259; 119 N. E. 2d 105.

This honorable court has ofttimes refused to take jurisdiction where a decision of a State Court has been based on adequate non-federal grounds, e.g., *Portland Railroad Co. v. Portland & Kennebec Railroad Co.*, 81 U. S. 23, 20 L. Ed. 850; *Roth v. Ehman, et al.*, 107 U. S. 319, 27 L. Ed. 499, 2 Sup. Ct. Rep. 312.

In order for the Supreme Court of the United States to take jurisdiction of a judgment of a state court, it must appear not only that a Federal question was argued or presented to that Court for decision, but also that such Federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it.

Moore v. Mississippi, 21 Wall. 636, 22 L. Ed. 653; *Brown v. Atwell*, 92 U. S. 327, 23 L. Ed 511, *Marrow v. Brinkley*, 129 U. S. 178, 32 L. Ed. 658, 9 Sup. Ct. Rep. 267; *Blount v. Walker*, 134 U. S. 607, 33 L. Ed. 1036, 10 Sup. Ct. Rep. 606; *Rogers, Jr. v. Jones*, 214 U. S. 196, 53 L. Ed. 965, *Browne v. Union Pacific Railroad Co.*, 267 U. S. 255, 69 L. Ed. 601, 45 Sup. Ct. Rep. 669; *George O. Richardson Machinery Co. v. Scott*, 274 U. S. 729, 71 L. Ed 1319, 48 Sup. Ct. Rep. 264; *Utley v. St. Petersburg*, 292 U. S. 106, 78 L. Ed. 1155, 54 Sup. Ct. Rep. 593; *Bass v. Milledgeville*, 295 U. S. 721, 79 L. Ed. 1675, 55 Sup. Ct. Rep. 926; *Fox Film Corp. v. Miller*, 296 U. S. 207, 80 L. Ed. 158, 56 Sup. Ct. Rep. 183; *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 89 L. Ed. 2092; 65 Sup. Ct. Rep. 1475.

This court has repeatedly held that it will not review a state court decision founded on an adequate and independent non-Federal ground even though the state court may also have erroneously decided a Federal question presented to it for decision. *Lynch v. New York*, 293 U. S. 52, 79 L. Ed. 191, 55 Sup. Ct. 16. The Honorable Chief Justice Hughes in delivering the opinion of the Court made the following statement at pages 54-55:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to

the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U. S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; Johnson v. Risk, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 295, 297, 35 L. ed. 193-197, 11 S. Ct. 528; Eustis v. Bolles, 150 U. S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; Whitney v. California, 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; Mellon v. O'Neil, 275 U. S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arguimbau, 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 S. Ct. 622; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 S. Ct. 111, supra; Walter A. Wood, Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 S. Ct. 528, supra; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 599, 57 L. ed. 982, 983, 33 S. Ct. 605; Cuyahoga River Power Co. v. Northern Realty Co. 244 U. S. 300, 302, 304, 61 L. ed. 1153, 1157 1158, 37 S. Ct. 643."

In addition to the cases cited above and those cited in the above quotations, other decisions in accord with the views expressed in the *Lynch* case, supra, include: *Honeyman v. Hanan*, 300 U. S. 14, 81 L. Ed. 476, 57 Sup. Ct. 350; *Southwestern Bell Telephone Company v. Oklahoma*, 303 U. S. 206, 82 L. Ed. 751; 58 Sup. Ct. 528; *Woolsey v. Best*, 299 U. S. 1, 81 L. Ed. 3, 57 Sup. Ct. 2; *Williams v. Kaiser*, 323 U. S. 471; 89 L. Ed. 398; *Stembridge v. Georgia*, 343 U. S. 541, 96 L. Ed. 1130, 72 Sup. Ct. 834; and *Dwiley v. Mayo*, 351 U. S. 277, 100 L. Ed. 1178, 76 Sup. Ct. 806.

The above cases are ample authority why this court should not entertain jurisdiction of this cause. The Ohio courts have decided this cause upon the entirely independent non-Federal ground that the wrong defendant was brought into court. Even if the courts were erroneous in their other conclusion that the petitioner had no right to recover in any event, recovery would still be precluded as against the sole respondent, the City of Columbus, Ohio, upon the ground that the Columbus, Ohio City Health District and not the City of Columbus, Ohio would be the proper party to proceed against. Petitioner originally brought this action against both entities, but prior to trial and decision in the Common Pleas Court voluntarily elected to proceed solely against the City of Columbus, Ohio. That petitioner made an unfortunate choice should be of no concern to this Court.

The petition reveals that petitioner bases its argument that a federal question is involved upon the assumption that the payments were made to the City of Columbus, as is clearly evinced by the following statement at page 13 of the petition:

> "Petitioner therefore was entitled to recovery of these funds from the City of Columbus, to which the payment was made * * *."

The Ohio courts have decided, however, that in fact and as a matter of Ohio law the payments in question were not made to the City of Columbus but rather were made to the City Health District. Thus, petitioner's entire argument fails because it is based upon an erroneous premise.

In view of the foregoing it is respectfully submitted that the petition for a writ of certiorari should be denied for the reason that the decison of the Ohio courts was based

upon the adequate and independent non-Federal question that no payments had been made by petitioner to the sole remaining respondent.

2. There has been no Denial of Due Process for the Petitioner has Received Full Benefits for the Payments made and to Permit Recovery of such Payments would Result in an Unjust Enrichment of Petitioner.

The second ground upon which the Ohio courts have resolved this case is that the petitioner has received full value for the fees paid in the form of meat inspection services and cannot now place the Board of Health of the Columbus, Ohio City Health District in status quo. The judgment entry of the Common Pleas Court (see appendix II), which is the only indication of the ground upon which this cause has ben decided, contains the following conclusions of law:

> "• • • 3. Plaintiff acquired possession of something of value, namely meat inspection services • • •
>
> "4. It is impossible for plaintiff now to return said services and thereby put said Board of Health in status quo.
>
> "5. Plaintiff has received full value for the fees paid by it for said meat inspection services rendered by said Board of Health. • • •"

Petitioner has cited two decisions concerning the recovery of illegal taxes. *Ward v. Love County*, 253 U. S. 17, and *Carpenter v. Shaw*, 280 U. S. 363. Both of these cases involved the imposition of taxes upon real property in Oklahoma owned by Indians, which property had been declared to be tax exempt by virtue of a treaty between the Indians and the United States. In several other cases, however, this Court has dimissed appeals involving attempts to re-

cover taxes paid on the ground no Federal question was involved. *Tyler v. Cass County*, 142 U. S. 288, 35 L. Ed. 1016, 12 Sup. Ct. 225; *Bellows Falls Power Co. v. Massachusetts*, 245 U. S. 630, 6..2 L. Ed. 520, 38 Sup. Ct. 63; *Mississippi ex rel. American Mfg. Co. v. Reynolds*, 245 U. S. 635; 62 L. Ed. 523, 38 Sup. Ct. 189; *Sears v. Nahant*, 248 U. S. 542, 63 L. Ed. 412, 39 Sup. St. 133.

We are not here concerned with illegally assessed taxes, but rather are concerned with the collection of meat inspection fees which were subsequently declared to be invalidly imposed, not because they were excessive or in any way a denial of due process, but because the entity imposing the fees had no authority to impose them. (*See Brunner et al. v. Rhodes*, supra, set out in full as appendix IV to the petition.) In this regard, it must be remembered that only twenty per cent of the meat inspected was sold within the City Health District, the remaining eighty per cent being sold in other localities, most of whom required meat inspection. All of the meat inspected was sold in Ohio. Thus, the meat inspection services rendered by the City Health District to the petitioner enabled it to carry on a substantial business outside the district and which had no connection with the District. The benefits thus ensuing to petitioner were real and substantial for it was thereby enabled to carry on a substantial business that could not have been carried on had the City Health District for financial reasons ceased all meat inspection services. Petitioner made no effort to obtain this service elsewhere, but rather admits that this meat inspection service was essential to its continuing to maintain its business outside the City Health District. Essentially all the Ohio courts have done is apply the principle that if someone accepts the benefits under an invalid law or regulation he is

estopped to repudiate its burdens. See 11 *Am. Jur.* 767 (Constitutional Law Sec. 122). See also 19 *American Jurisprudence* 682-687 (Estoppel Sec. 64) wherein it is stated:

> "Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts of benefits from a transaction, contract, instrument, regulation, or statute which he might have rejected or contested. * * * Such estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction insofar as it imposes a liability or restriction upon him, or, in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation. * * *"

Thus, the petitioner has been deprived of no right but rather has merely received application of the principle that no one is entitled to receive something for nothing nor to accept the benefits of an invalid regulation and then repudiate the obligations thereunder.

As to a denial of due process, there is even less justification for that argument here than in the situation wherein an ordinance imposing a special assessment has been declared invalid for procedural and technical reasons, and a re-assessment is made upon the benefited properties involved after the improvement has been completed. This Court has, however, declared that the making of such a re-assessment does not constitute a denial of due process. *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Longbard v. West Chicago Park*, 181 U. S. 33; 45 L. Ed. 731, 21 Sup. Ct. 507; *Seattle v. Kelleher*, 195 U. S. 351, 49 L. Ed. 232, 25 Sup. Ct. 44.

Petitioner has cited no authority to support its position that it has been deprived of its property without due process of law. Two of the cases it cites are discussed

and distinguished above. The other two cases cited involved situations wherein persons attempted to secure jurisdiction of the Federal Courts to enjoin state imposition of taxes. The courts merely held that an adequate remedy at law existed by way of an action to recover the taxes paid if they were illegally assessed. Those cases, likewise, are not applicable for the further reason that no question of benefits received and retained was involved.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied for two reasons:

(1) Because the cause was decided by the state courts on the adequate and independent non-Federal ground that the payments recovery of which is sought were not made to the sole respondent, City of Columbus, Ohio, and accordingly petitioner cannot recover such payments from respondent.

(2) Because petitioner received full value by way of the benefits ensuing from the services rendered enabling petitioner to maintain a substantial business outside the City Health District and cannot now return those benefits and should not be permitted to accept such benefits and at the same time repudiate the obligations which are a necessary corollary to the benefits accepted.

Respectfully submitted,

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APPENDIX I

Journal Entry of the Court of Common Pleas

This day this cause came on to be heard on the pleadings and an agreed statement of facts and was submitted to the court, a jury having been waived.

On consideration thereof and upon request of counsel for the plaintiff, the court states herein its conclusions of fact found separately from the conclusions of law as follows:

As conclusions of fact, the court finds that:

1. This case was submitted to the court upon the pleadings and an agreed statement of fact and the court, accordingly, incorporates herein all of the facts set forth in said agreed statement of fact and all facts admitted to be true in the answer and reply as its conclusion of fact herein.

And as conclusions of law, based on the foregoing conclusions of fact, the court finds:

1. The regulations of the Board of Health of the Columbus, Ohio city health district, under which the meat inspection fees here in question were paid by plaintiff, were void, and said Board of Health had no power or authority to assess or collect said fees.

2. The payments of meat inspection fees by plaintiff herein were involuntary payments.

3. Plaintiff acquired possession of something of value, namely, meat inspection services which had been performed by the Board of Health of the Columbus, Ohio city health district, under a regulation which was later declared to be void.

4. It is impossible for plaintiff now to return said services and thereby put said Board of Health in status quo.

5. Plaintiff has received full value for the fees paid by it for said meat inspection services rendered by said Board of Health.

6. The treasurer of the city of Columbus, Ohio, in accepting and receiving the meat inspection fees paid to it by David Davies, Inc., was accepting and holding said fees as custodian for the Board of Health of the Columbus, Ohio city health district.

7. The treasurer of the city of Columbus, did not receive or hold said fees for the city of Columbus, Ohio.

8. The defendant, city of Columbus, Ohio, is not liable for moneys paid to the treasurer of the city of Columbus, Ohio, as custodian for the Board of Health of the Columbus, Ohio city health district.

9. At all times alleged in the petition the Columbus, Ohio city health district was a political entity separate and apart from the city of Columbus, Ohio.

10. The duty imposed on the council of the city of Columbus by Section 4451 G. C. did not alter the independent status of the Columbus, Ohio city health district.

11. Columbus City Ordinances No. 204-47, No. 286-47 and 2-48 did not alter the independent status of the Board of Health of the Columbus, Ohio city health district.

12. Any benefit received by the defendant, city of Columbus, Ohio, from payment of said meat inspection fees by the plaintiff was indirect and can not be the basis of a judgment against the defendant, city of Columbus, Ohio.

Based upon said conclusions of fact and law the court finds against the plaintiff herein and in favor of the defendant, city of Columbus, Ohio, all other defendants herein having heretofore been dismissed from this action.

It is, therefore, hereby ordered, adjudged and decreed that plaintiff's petition herein be and the same is hereby

dismissed and that judgment be and is hereby rendered in favor of the defendant, city of Columbus, Ohio, and against plaintiff, David Davies, Inc., and that the costs of this action be assessed against the plaintiff herein.

To all of which plaintiff herein excepts and its exceptions are hereby noted.

APPENDIX II

Entry of the Court of Appeals

This cause came on for hearing on an appeal on questions of law, assignments of error, the transcript, agreed statement of fact and the original papers and pleadings from the Court of Common Pleas, Franklin County, Ohio, and was argued by counsel; on consideration thereof, the court finds that the trial court held that the defendant, City of Columbus, is not and cannot be held liable for the monies paid by the plaintiff to the city treasurer as custodian for the City Board of Health, and further held that plaintiff was not entitled to recovery. The court further finds that it is in accord with the reasoning of the decision of the trial court and that accordingly the several assignments of error are not well taken and should be overruled and that the judgment of the Common Pleas Court should be affirmed.

It is therefore ordered and adjudged that all assignments of error herein by plaintiff-appellant be, and they hereby are, overruled, and that the judgment of the Court of Common Pleas of Franklin County, Ohio be, and it hereby is, affirmed, and that this appeal be, and it hereby is, dismissed at the costs of plaintiff-appellant. To all of which plaintiff-appellant excepts and its exceptions are hereby noted.

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FILED
APR 30 1959
JAMES R. BROWNING, Clerk

No. 723

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

DAVID DAVIES, INC.,

Petitioner,

vs.

MAYNARD E. SENSENBRENNER, ETC., ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER

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OCTOBER TERM 1958

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Respondents.

REPLY BRIEF FOR PETITIONER

In its brief herein at page 3, respondent claims that the petition herein should be denied because the Ohio courts found that the City of Columbus, Ohio did not receive the payments made by plaintiff for meat inspection fees and that, accordingly petitioner could not recover from this respondent; on the basis of this respondent claims the case was decided on a non-federal ground.

It is correct that the trial court made such a finding. We hasten to point out, however, that the trial court's decision and judgment was based upon a totally different ground, namely a determination that petitioner herein could not recover because it could not restore the respondent, City of Columbus and the Board of Health to status quo. The trial court then went on to add as a tail to its kite the finding that the City of Columbus had not received the money.

The Court of Appeals merely adopted the reasoning and finding of the trial court in affirming its decision. Accordingly, here too then the alleged non-federal ground was again a tail on the kite of the real ground for determination of the case. The appeal as of right in the Ohio Supreme Court, of course, was dismissed with no opinion and on finding that there was no debatable constitutional question.

This appeal, of course, is from the decision of the Supreme Court of Ohio, in which it found that there was no debatable constitutional question. That determination had nothing to do with any finding as to whether or not respondent had actually received the payments in question from petitioner. It was based solely and entirely on the question of whether or not petitioner's constitutional rights had been invaded. This petition for writ of certiorari is from that determination of the Supreme Court of Ohio. We accordingly submit that there is no question of determination of the case on a non-federal ground by the Supreme Court of Ohio.

Even if there is a possibility that this case could have been or was decided on a non-federal ground, it is a basic rule of the Supreme Court of the United States that it will examine the non-federal ground in order to find if such ground is fair and substantial. If this court finds that the ground is not fair and substantial but that it is so clearly ill-found that it cannot sustain the judgment or is frivolous, then this court will take jurisdiction of the case. A concise exposition of this determination which has been made in many cases by this court is found in *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, as follows:

> Page 475: "Res judicata, like other kinds of estoppel, ordinarily is a matter of state law and as the

decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the federal questions? and (b) is the decision reached upon the point sufficiently well founded to furnish adequate support for the judgment? Eustis v. Bolles, 150 U. S. 361; Southern Pacific Co. v. Schuyler 227 U. S. 601; Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157.

"Waiving the doubt whether under the particular facts of this case, the question of res judicata can be regarded as independent of the federal questions that were raised, we are of the opinion *that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment;*

Again, in *Konigsberg v. State Bar of California*, 353 U. S. 252, we find the following statement:

2. "The evidence in the record does not rationally support the only two grounds upon which the Committee relied in rejecting petitioner's application and therefore the State's refusal to admit him to the bar was a denial of due process and equal protection of the laws in violation of the Fourteenth Amendment."

An examination of the facts in the instant case will reveal that the trial court and the appellate court have absolutely no basis upon which to make the determination that the payments in question were not made to the City of Columbus.

All of the inspection fee payments were made to the treasurer of the City of Columbus. (Sections 8 and 11 of agreed statement of fact). At the same time that the Board of Health regulation assessing inspection fees was passed, the council of the City of Columbus passed Ordinance No. 20447 (Exhibit "E"), titled "To establish a meat inspection fund". Section 1 of that ordinance pro-

vided that all meat inspection charges paid into the city treasury should be credited to a separate fund, known as "Meat inspection fund". Section 2 of that ordinance provided that the city auditor be authorized and directed to establish a special fund pursuant to G. C. 5625-11 (R. C. 5705.12). An examination of that section of the General Code reveals that it applies only to funds established by municipalities.

Shortly after the passage of this first ordinance, the Columbus city council passed an appropriation ordinance, making an appropriation of the monies in the meat inspection fund set up in the previous ordinance . .

Then in January of 1948 (the year following the institution of the inspection fee), the Columbus city council passed Ordinance 2-48 (Exhibit "G"), which provides as follows:

> Section 3. "On and after January 1, 1948 all funds received from the issuance of birth and health certificates, together with fees received from milk inspections; *meat inspections* and food inspections *are to be paid into the City Treasury* for the credit of the fund for general purposes, otherwise known as the 'General Fund' for the purpose of providing funds with which to pay the appropriations to be made as provided in Section 2 hereof." (Emphasis ours)

In Section 2 this ordinance provided that each year in the annual appropriation ordinance of the city, funds should be appropriated to each of the divisions involved, including the meat inspection division. This ordinance was in effect throughout the balance of the duration of the inspection fee payments and accordingly each year an appropriation was made as provided in this ordinance. It should be emphasized that this Ordinance 2-48 provided that the payments of meat inspection fees were to be placed in the general fund of the city; that fund into which all revenues

of the city are paid. Basically, therefore, from the first of January 1948 on, all meat inspection fees paid by the appellant herein went into the common pot from which all expenses of the City of Columbus were paid. Those payments lost their identity in the general fund and thereafter the expenses of the Board of Health were paid from a meat inspection fund appropriated by the city council from the general fund and handled in exactly the same way as every other fund of the City of Columbus.

In summary, therefore, the payments here involved were made to the Columbus city treasurer and the City of Columbus took jurisdiction of these payments, placed them in funds established by action of its city council, and disbursed them accordingly. In other words, these monies were received, handled and disbursed in exactly the same fashion as were all other revenues received by the City of Columbus. The city exercised complete dominion over them.

The defendant, moreover, in its answer conceded that the monies here in question were paid to and received by the City of Columbus. Thus, at page 2 of the answer, in the second defense, the defendant acknowledges the validity of its actions in handling the money in the following language:

> "And that the Council of the City of Columbus, Ohio on the 21st day of April, 1947, *acting within its just legislative powers and rights* duly passed ordinance No. 204-47 providing for disposition of fees collected for meat inspection performed under the authority of said Board of Health of the City of Columbus . . . ." (Emphasis ours)

By the like reasoning, therefore, the following ordinance, 248, would have the same seal of validity.

Further allegations in defendant's answer serve to solidify its acknowledgment that the money was received, held and used by the City of Columbus. Thus, at page 3 in the third defense we find the following language:

> "That the *defendants* made assessments and *collected* certain sums of money from the plaintiff for and on the basis of the said meat inspection services." (Emphasis ours)

Originally in this action the City of Columbus and the Board of Health were joint defendants. Obviously, if it had been intended to claim that the defendant, City of Columbus, had not collected the money here involved, this allegation would not have been so written. It would have specified that the defendant, Board of Health, assessed and collected. Under the fact situation in this case, the Board of Health was making the assessments and not the City of Columbus. Obviously, therefore, the phrase "made assessments" could apply only to the Board of Health. The money was collected by the City of Columbus and therefore that word must apply to the City of Columbus. Accordingly, the defendant is again admitting that the city collected and received the money. Finally, there was not one word in the agreed statement of facts to even indicate that the payments were made to the Board of Health.

The following language in the fourth defense on page 3 of defendant's answer is as follows:

> "And that the monies so collected from plaintiff have been disbursed by the defendants . . ."

Again, if the city had intended to claim that the money was solely handled and disbursed by the Board of Health, the answer would have said so. To the contrary, it uses the word "defendants" which, of course, included the City

of Columbus, and there admits that the city had a part in the disbursement. Obviously, the city could make no disbursement if it never had the money. Furthermore, if the City of Columbus had intended to deny that it had received the money, that is a defense which should have been affirmatively pleaded. To the contrary, there was no such language. We might add, that nowhere in the city's brief in the trial court was any claim that The City of Columbus did not receive the funds here involved. Obviously, on the basis of the facts of the case as set forth above, the city could not so claim.

In the face of the foregoing undisputed facts, the trial court and Court of Appeals chose to completely ignore them and upon the basis of a tortured interpretation of the law of Ohio find that the treasurer of the City of Columbus was acting as treasurer for the Board of Health, under authority of G. C. 1261-3 (R. C. 3709.31) and therefore received the inspection fee payments into a health fund held for the Board of Health. It apparently mattered not to these courts that there was not one word in the agreed statement of fact of the existence of any such health fund and no allegation in the pleadings of any such health fund. Obviously, there could not have been, because there never was in existence a separate health fund of the Board of Health. The health fund thus was solely a fictitious legal figment manufactured by these courts to substantiate their argument.

We submit therefore that any determination by the trial court and the Court of Appeals, finding that the City of Columbus did not receive the money paid for inspection fees, was without foundation either in fact or in law. It could not sustain the judgment against petitioner. Accordingly, if this court chooses to go beyond the refusal of the

Ohio Supreme Court to entertain petitioner's appeal on constitutional grounds, there is no fair and substantial non-federal ground upon which this case was or could be decided.

Respectfully submitted,

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